



CITY OF HAYWARD

AGENDA REPORT

Planning Commission

Meeting Date 04/11/02

Agenda Item 3

TO: Planning Commission

FROM: Carl T. Emura, Associate Planner

SUBJECT: Adminisitrative Use Permit No. 00-150-20 - Elias Motaz, Pinnacle Stone (Applicant)/Robert S. Figone Trust (Owner)- Victoria Pope (Trustee): To Request for Temporary Outdoor Storage, Display and Manufacturing

The Property Is Located at 4321 Breakwater Avenue in the Industrial (I) District.

RECOMMENDATION:

Staff recommends that the Planning Commission:

1. Find that the proposed project is Categorically Exempt from the California Environmental Quality Act (CEQA) guidelines, Section 15332 Infill Development Project.
2. Approve the Administrative Use Permit for a temporary use subject to the attached findings and conditions of approval limiting use of the property for Outdoor Storage until August 31, 2003.

DISCUSSION:

Setting

The site is the last piece of developable land on Breakwater Avenue before the Hayward/San Mateo Bridge. It is approximately 1 acre in size and irregular in shape. The property was annexed to the City in 1983.

The area to the west of the property is zoned Flood Plain (FP) District and is intended for shoreline preservation purposes. The area to the east, across Johnson Road, is zoned Industrial and is marginally developed with an equipment rental company and two construction storage yards. Caltrans owns the parcel to the east where a pedestrian overpass over State Route 92 is under construction.

The property contains a trailer that has been used as an office and a tall open shed and a billboard, which existed on the site since at least 1976. An open shed built without permits by the applicant is attached to the tall shed. A portable toilet provides sanitary facilities and an on-site well provides water.

Background

The applicant applied for an administrative use permit after being notified by the City that he was in violation of the Zoning Ordinance in that he was operating a use involving outdoor storage without benefit of a use permit.

In response, the applicant applied for an administrative use permit for major outdoor storage and it was administratively denied because the improvements proposed by the applicant and property owner did not meet the City's design and performance standards for long term use.

The property owner then contested the staff's position relative to the loss of the legal nonconforming status as an outside storage yard with minor retail sales. The property owner contended that the property retained its legal nonconforming status in that the property had been used for outdoor storage for over 20 years, that retail sales of some of the equipment occurred over time, and the noise and dust associated with the current use is no greater than the noise and dust from Highway 92. They appealed the denial and it was scheduled for a planning commission hearing. Prior to the hearing, the property owner requested a continuance and it was pulled from the agenda.

The property owner then requested temporary use of the site for the wholesale/manufacturing stone operation. The property owner pointed out that Caltrans had recently acquired a portion of their property for the purpose of constructing a pedestrian overpass over Highway 92, which will become part of the Bay Trail; and because of the construction activity associated with this project, they indicate is not possible to market and develop the parcel until that project is complete. They are now seeking approval of a temporary use until December 31, 2003, which is the date the current lease on the property expires and two months following the anticipated completion of the overpass.

Legal Nonconforming Status

It is staff's understanding that the property was initially used as a staging area for the construction of State Route 92 and later for storage of construction equipment. Aerial photographs taken in 1976, 1984 and 1996 confirm that the site was used for outdoor storage. When annexed to the City in 1983, outdoor storage on the property was considered a "legal nonconforming use."

The property owner, Robert S. Figone passed away in 1995 and his business licenses (Future Co./Robert Figone Equipment Co) were terminated on February 16, 1996.

The Robert S. Figone Trust leased the property to Elias Motaz in January 1997 for 5 years with options to renew in 2, two-year increments for his stone wholesaling and manufacturing (custom cutting) business. Because there was a lapse of time in which a viable business was operated from the site, staff believes that the legal non-conforming status of the property as a storage yard has lapsed.

The Planning Director finds that the wholesaling and manufacturing of stone is a new use for the site and constitutes an intensification of the previous uses on the property. Therefore, even if the property did not lose its nonconforming status because some form of storage may have existed, as claimed by the property owner, a use permit is required nonetheless because the proposed use is an intensification of the previous use of the property. Specifically, the current operation has resulted in increased vehicular and pedestrian traffic, the area devoted to outdoor storage was enlarged, and there are several employees on the site. The applicant has also added an open shed and would like to add additional structures. If the applicant were to remain on the site permanently, other improvements such as hooking up to the sanitary sewer, providing sanitary facilities and paving the driveway and parking areas would be required. The new uses would thereby be intensifying the use of the site.

Under Section 10-1.2915f of the Zoning Ordinance, in order for a property to continue its legal nonconforming use status,

- ◆ *There must not be an increase in the intensity of the nonconforming use,*
- ◆ *The nonconforming use cannot be discontinued for a period of six or more months, and*
- ◆ *The nonconforming use must not adversely affect or be materially detrimental to adjoining properties.*

Because the nonconforming use was discontinued for over a period of six months as indicated by the termination of Mr. Figone's business license (February 1996) and the date the property was leased (January 1997) and other more intensive uses (manufacturing and wholesaling), were added to the site, increasing the intensity of the nonconforming use, the legal nonconforming use status was terminated and a use permit was required.

Proposal

The applicant is seeking approval of a temporary use permit to allow the continued operation of a wholesale/manufacturing stone operation until December 31, 2003, which corresponds to the termination date of their current lease agreement. The applicant indicates that he is willing to install trees along their street frontage on Breakwater Avenue to screen the use and to enhance the streetscape. The trees could then become established for future uses. The applicant proposes to continue using the

trailer as a business office and the tall metal shed as a workshop area. He will remove all structures constructed without building permits.

The site is prominent, being at a major entry point to Hayward, with unobstructed views to the site. Typically, a trailer office, an open sheds, portable toilets and outdoor storage do not contribute to an image the City wishes to project to those entering the City limits. However, as a temporary situation under the current circumstances, staff believes that this request may be supported for a limited time. Currently, the site is surrounded by the Caltrans project (east) and a business with major outdoor storage (north), and the adjacent State Route 92 to the south is undergoing widening.

Although the applicant requests that the temporary use be allowed to remain until the current lease expires, staff believes that the temporary use, if approved, should cease at a time preceding the anticipated completion of the overpass so that the site can be in a condition that is compatible with the overpass and the Bay Trail. This would also result in a more appealing site in terms of attracting more intensive, tax-generating, high employment industrial uses that are more suited to this key gateway location and would be more beneficial to Hayward's industrial base. Because of the legal nonconforming nature of the use, staff recommends that at the end of the period for the temporary use, the entire nonconforming use of the property be abandoned and the structures removed.

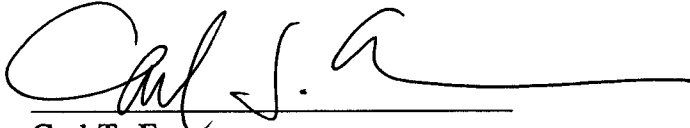
Environmental Review

The proposed project is categorically exempt from the California Environmental Quality Act (CEQA) guidelines, pursuant to Section 15332 (Infill Development Project).

Public Notice:

On March 28, 2002, a Notice of Public Hearing was mailed to every property owner and occupant within 300 feet of the subject site, as noted on the latest assessor's records. Previously a notice seeking general comments regarding the administrative use permit was mailed to all the above individuals when the applicant submitted the administrative use permit application. One response from a business owner located at 3871 Breakwater Avenue was received indicating he has no objection and supports the application (see attached comment).

Prepared by:

A handwritten signature in black ink, appearing to read "Carl T. Emura", written over a horizontal line.

Carl T. Emura
Associate Planner

Recommended by:

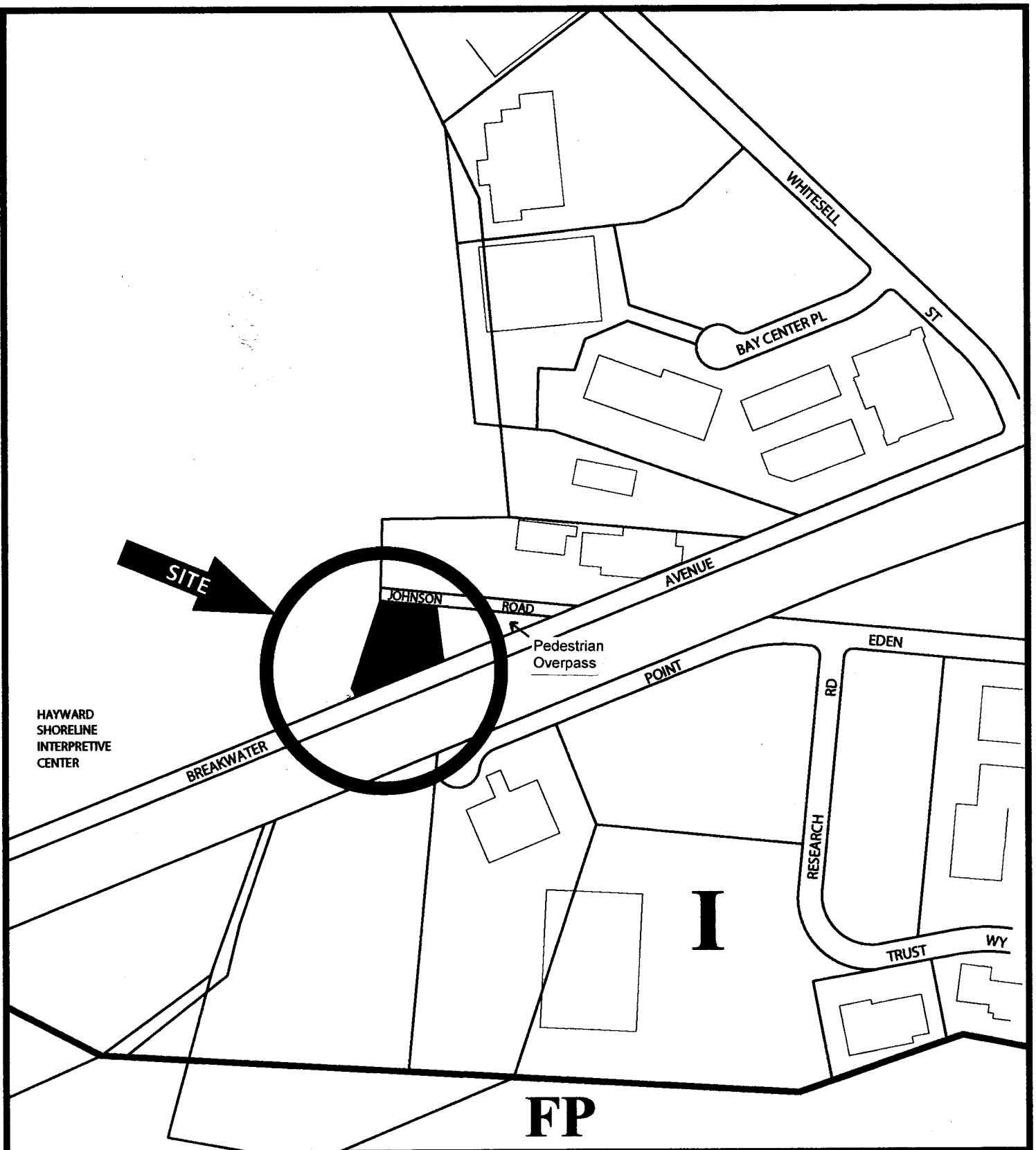
Dyana Anderly, dn

Dyana Anderly, AICP

Planning Manager

Attachments:

- A. Area/Zoning Map
- B. Findings for Approval
- C. Conditions of Approval
- D. E-Mail dated 6/22/2000 not objecting to the application
- E. Appellant's Letter of Appeal dated 11/14/2000
Plans
- F. Pedestrian Overpass



Area & Zoning Map

AUP-00-150-20

Address: 4321 Breakwater Avenue

Owner: Elias Motaz

I-Industrial

FP-Flood Plain

FINDINGS FOR APPROVAL

AUP 00-150-20

4321 Breakwater Ave

Elias Motaz/Applicant, Robert Figone, Jr. ETAL/Owner

1. The proposed project is Categorically Exempt from the California Environmental Quality Act (CEQA) guidelines, pursuant to Section 15332 Infill Development Project.
2. That the proposed temporary use of the property for a stone wholesaling and manufacturing business is desirable for the public welfare in that it provides a resource for imported stone for Hayward residents.
3. That the proposed temporary use of the property for outdoor storage will not impair the character and integrity of the zoning district and surrounding area during the period the pedestrian overpass is under construction.
4. That the proposed temporary use of the property for outdoor storage will not be detrimental to the public health, safety, or general welfare. Although it is an expansion and intensification of the existing use the applicant's stone wholesaling and manufacturing has a relatively low impact on the surrounding area. The stone cutting is limited to a covered area and water is run during the process to minimize dust.
5. That the proposed temporary use of the property is in harmony with the intent and purpose of the zoning district in that wholesaling and manufacturing is an primary use in this zoning district. The outdoor storage of stone material will blend in with the adjacent construction site, but will detract from the area once the pedestrian overpass is completed and landscape installed.

CONDITIONS OF APPROVAL

AUP 00-150-20

4321 Breakwater Ave

Elias Motaz/Applicant, Robert Figone, Jr. ETAL/Owner

1. The applicant shall obtain a business license and pay for back taxes to the City as required by the City's Revenue Division within 30 days of approval of this permit.
2. Street Trees shall be planted along Breakwater Ave at 20 to 40 feet on center minimum. Trees shall be 24" box size. Species, spacing and planting shall be approved by the City Landscape Architect prior to planting. An automatic irrigation system shall be provided. Street Trees shall be planted per City Standard detail SD-122. Trees shall be planted with 60 days of approval of this permit
3. The illegal structures shall be removed shall be removed within 30 days of approval of this permit.
4. The illegal sign shall be removed within 10 days of approval of this permit. An approved sign permit will be required prior to installation of any new sign.
5. This temporary use shall be permitted until August 31, 2003. At that time, the entire nonconforming use of the property must be abandoned and all structures, including the trailer equipment and portable sanitation facility, with the exception of the billboard, must be removed by the applicant immediately thereafter. All weeds and debris shall be removed and the property shall be hydroseeded per the the City Landscape Architect's requirements. The hydroseeded mix shall be irrigated till it is established.
6. Violation of these conditions is cause for revocation of permit after a public hearing before the duly authorized review body.

From: "gmsalusky" <gmsalusky@msn.com>
To: COHD.CED(JimD)
Date: Thu, Jun 22, 2000 7:11 PM
Subject: 4321 Breakwater Ave. Hayward Pinnacle Stone

I have no objections to Pinnacle Stone operating down the street from me. Gary Salusky 3871 Breakwater Ave. Hayward, Ca. 94545 (510) 782-9454 / 760-9750

ATTACHMENT D

Letter addressed to planning commissioners

RE: Appeal of Denial of Administrative Use Permit No. 00-150-20 - Elias Motaz, Pinnacle Stone (Applicant/ Robert J. Figone Trust (Owner/ Appellant)

Dear Commissioners:

This firm represents the Robert J. Figone Testamentary Trust ("the Figones"), the owners of the subject property at 4321 Breakwater Avenue in Hayward. For the following reasons, the Figones appeal the denial of an Administrative Use Permit for this property. The Figones respectfully request that all documents related to this application and appeal, and all oral proceedings before the Planning Commission be recorded and preserved as part of the public record in this matter.

A Use Permit is Not Needed, as the Use is a Legal Nonconforming Use.

As a threshold matter, the facts show that no use permit is required. Pinnacle Stone has been, and may continue to operate as a legal nonconforming use at this site. Apparently, City staff recently informed the operator of Pinnacle Stone, Elias Motaz, that he needed to apply for a use permit.¹ Mr. Motaz followed the instructions of City staff, and, following the recommendation of staff, the Planning Director denied the application. However, this property has been used for open storage for more than twenty years. That use has not substantially changed since that time. Accordingly, it is exempt from use permit requirements, and is legally allowed to continue.

"A nonconforming use is a lawful use existing on the effective date of the zoning restriction and continuing since that time in nonconformance to the ordinance." McCaslin v. City of Monterey Park (1958) 163 Cal.App.2d 339, 346. As the Agenda Report for January 11, 2001 states, "[w]hen annexed to the City in 1983, it [the open storage on the property] was considered a 'legal nonconforming use.'" **Since that time, the use has not changed.** Accordingly, the current use is a legal nonconforming use. **An operator of a legal nonconforming use is entitled to**

¹ The Agenda Report for the Meeting of January 11, 2001 states on page one that "[t]he Pinnacle Stone business came to staff's attention via a citizen complaint to the Community Preservation Division." No other direct reference is made to this complaint in the Agenda Report or the Planning Director's Findings for Denial, so that it is impossible to discern whether this complaint had any bearing on the initial decision to deny the use permit. The nature of this complaint and the identity of the complainant have not been made known to the applicant or appellant. Before the Planning Commission takes any action on this appeal, in the interests of due process the appellant respectfully requests that staff be directed to disclose any and all information in their control regarding this complaint.

continue “operations as a matter of right, [and is] not required to obtain a special use permit.” Id. at 349 (emphasis added).

The Findings for Denial of the Administrative Use Permit Application are inadequate, as they do not controvert the fact that Pinnacle Stone is a legal nonconforming use. Indeed, no such finding can be made. As noted in the Agenda Report, there has been open storage on the property since before 1983, when the property was annexed into the City. Pinnacle Stone has operated on the property since January 1997², continuing to use open storage. The use of open storage began well before both the City’s jurisdiction and the adoption of the current Industrial District zoning ordinance in September 1999, which allows major outdoor storage only as a conditional use. (Sec. 10.1-1620b.(1)(b).)

The Use has not Intensified.

While the Planning Director makes no finding on this fact, staff’s Agenda Report touches on the issue of intensification of use, as a justification for requiring Mr. Motaz to obtain a use permit to operate Pinnacle Stone.³ Because there has been no such intensification, no use permit is required. City of Hayward Zoning Ordinance Section 10-1.2915.a. states that a “[c]hange of ...tenancy...of a nonconforming use shall not affect its legal nonconforming status, provided that the use and intensity of use, as determined by the Planning Director, does not change.” Thus, the fact that Pinnacle Stone began its tenancy in January 1997 has no effect on the continuous use, for the past 20 years, of the property for open storage.

It bears repeating that the Planning Director has made no finding that Pinnacle Stone constitutes an intensification of use. In fact, the Director, in her findings, expressly refers to the current use as “*low intensity* open storage....”(See Findings, Section C.; emphasis added) The Agenda Report also notes, at page 3, that “there is no record of any recent contractor’s activity (after 1995) associated with the property....” Pinnacle Stone continues to use a portion of the property for open storage, the same use to which the property has been consistently put for over 20 years. Before Pinnacle Stone’s tenancy in 1997, the open storage of construction equipment on the property was an arguably *more* intense use of the property than Pinnacle’s. Accordingly, there is no evidence that Pinnacle Stone has intensified the prior legal nonconforming use of the property. Pinnacle Stone’s use is a legal nonconforming use, for which a use permit is not required.

² The Agenda Report incorrectly states, on page one, that the property was leased to Pinnacle Stone “approximately one year ago.” Enclosed with this letter a Lease Summary Sheet, indicating that the lease term began on January 1, 1997.

³ The Agenda Report at page 3 concludes, without factual support, that “...the proposed use is considered an intensification of the previous storage yard and is, therefore, subject to use permit approval.”

The Use has not been Discontinued

As stated previously, Pinnacle Stone is a legal nonconforming use, because its existence preceded both the annexation and jurisdiction of the City in 1983 and the 1999 adoption of the Industrial Zoning Ordinance. Pinnacle Stone is also entitled to legal nonconforming use status because the property's use as open storage has been continuous for over 20 years.⁴ Stokes v. Board of Permit Appeals (1997) 52 Cal.App.4th 1348, 1353. Before Pinnacle Stone's occupancy in January 1997, the property was used to store construction equipment. (The adjacent parcel to the east is currently in use as a construction equipment rental facility, with similar open storage.) The property has, since its annexation, always been used for open storage, establishing a vested right to continue that use. See, Goat Hill Tavern v. City of Costa Mesa (1992) 6 Cal. App. 4th 1519, 1526.

This Legal Nonconforming Use Cannot be Terminated due to Effects on Adjoining Properties, and in any Event, the Use does not Adversely Affect any Adjoining Property.

As the Nonconforming Use Ordinance reads, the Planning Director can allow a nonconforming use to be "established or replaced by another similar nonconforming use when the Planning Director finds", among other things, that the "use will not adversely affect or be materially detrimental to adjoining properties." Section 10-1.2915.f(2). This subsection of the ordinance does not apply in this circumstance, because the nonconforming use, of open storage, is ongoing, not a use which is to be "established or replaced by another similar nonconforming use."

Even if this subsection of the ordinance did apply, there is no evidence that Pinnacle Stone adversely affects the adjoining open space. To our knowledge, no adverse comments were received by the City from anyone, including the Hayward Area Recreational District, which owns and operates this open space. regarding Pinnacle Stone; no such comments are referenced in the staff report regarding this application.

The Planning Director's Findings, at section E state that the use is "detrimental to the public health, safety, or general welfare" in that the nature of the operation "involves the sawing, chiseling, and grinding of stone and stone products which generates dust and noise...." This finding does not consider Pinnacle Stone's dust containment and minimization procedures, used when it cuts stone products on site. As for noise, the constant traffic noise on the adjacent

⁴ Hayward Zoning Ordinance Section 10-1.2915.b. provides that if a nonconforming use is discontinued for six or more consecutive months, it loses its legal nonconforming status.

Highway 92 corridor far eclipses the occasional noise from cutting tools used on the property. Highway 92's constant, large scale generation of noise, dust and particulate matter is probably far more potentially harmful to the open space than any dust from natural stone products which might escape the subject property. Pinnacle Stone actually benefits the adjacent flood plain, providing a largely unpaved, undeveloped area which operates as a beneficial buffer, protecting the sensitive wetlands adjacent to it from the toxic effects of stormwater runoff from paved areas, fertilizers from landscaping, and other chemical runoff associated with the more developed properties in the area to the east, and mitigating any such effects from the freeway to the south.

Even Though Pinnacle Stone is Entitled to Continue in its Current Form Without a Use Permit, the Applicant is Sensitive to the City's Plans and Policies for This Area.

Above and beyond the fact that no use permit is required for this property, there are practical reasons why Pinnacle Stone should be allowed to continue its operation on the subject property. As the Agenda Report states, this property is approximately one acre, and is irregular in shape. It abuts an undevelopable flood plain on one side, and roads on two sides. Its immediate neighbor to the east is an equipment rental business, similar in use to the subject property. The Findings of the Planning Director recite the goals of the City plans and ordinances, to promote the development of "more intensive, tax-generating, high employment industrial uses" such as those serving "international trade, university-related research, and environmentally friendly businesses as well as warehouse retail, and business support retail and service uses...." The subject property, due to its small, irregular size and location, is simply not a viable candidate for development in the way envisioned by the City of Hayward's plans and policies.

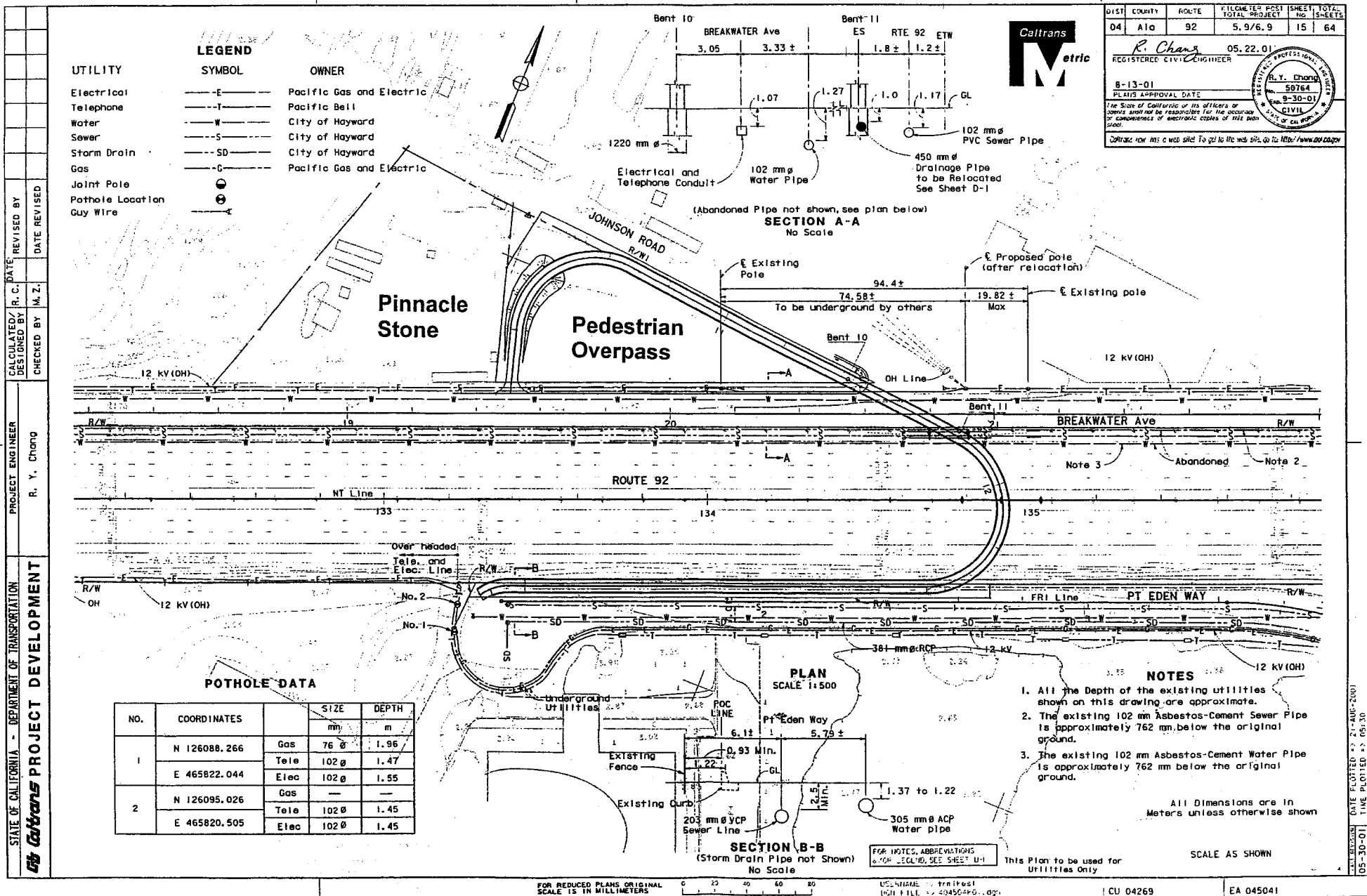
City Staff and the Planning Director have also voiced concerns about the esthetics of the property and its current use. We respectfully differ with staff regarding the value of this property as part of a "gateway" to Hayward. The property, located on the north side of Highway 92, is visible now only to those leaving Hayward, not entering it. CalTrans has purchased 3/4 of an acre of the original subject property, for improvements in connection with a pedestrian overcrossing and the expansion of Highway 92. There is some question⁵ about the height of the wall which CalTrans proposes to screen the subject property,

⁵ The appellants have attempted to contact CalTrans to confirm whether it plans to build a 14 foot sound wall, as the applicant had reported, a three foot wall, as City staff had reported, or something else. We have received no definitive answer from CalTrans. Because CalTrans' actions will be a major factor in the extent to which the property is screened, the City's esthetic concerns about the subject property can and should be addressed only when further information is obtained from CalTrans.

but it appears that there will be such a wall, obviating or at least mitigating any perceived aesthetic shortcomings of the subject property.

Until CalTrans substantially completes this expansion project, the area will be a relatively unsightly jumble of construction. A reasonable expectation is that substantial private economic improvement in the area will wait until after the inconvenience of the road improvements have passed. At that point, it may very well make economic sense for the owners of the subject property to redevelop their land. In the meantime, the continued operation of Pinnacle Stone functions to produce a "win/win" for both the property owner and the City. The City benefits from the continued fees and taxes generated by the business, and the Figones, the owners, derive the beneficial use of their land through rent paid by their tenant, Pinnacle Stone.

For the foregoing reasons, the appellants, the Figones, respectfully request that the Planning Commission vacate the decision of the Planning Director denying the use permit application, in recognition of the fact that the use of the subject property is an ongoing legal nonconforming use.



Pedestrian Overpass